lit.

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ADVANCED RESORTS, Appellant, v. TOWN OF LA CONNER, Respondent.	SHB No. 90-91 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This appeal of the rescission of a shoreline substantial development permit came on for formal hearing before the Board on October 31, 1991, at La Conner, Washington, and on November 14, 1991, at Lacey, Washington. Present for the Board were Members Annette S. McGee, Presiding, Harold S. Zimmerman, Chairman, Judith A. Bendor, Nancy Burnett, Les Eldridge, and Judith B. Barbour.

William H. Neilsen, Attorney, represented appellant Advanced Resorts, Inc., and Bradford E. Furlong, Attorney, represented respondent Town of La Conner. The proceedings were taped and were recorded, on October 31 by D.J. Stults, Court Reporter with Bartholomew, Moughton & Associates, Everett, Washington, and on November 14 by Betty J. Koharski, Court Reporter with Gene Barker & Associates, Olympia, Washington.

The Board viewed the site of the recreational vehicle park with the parties on October 31.

Opening statements were made, witnesses were sworn and testified, exhibits were admitted and examined, and oral final arguments were heard. Hearing and post-hearing memoranda were filed on December 31, 1991. The Board has reviewed the record, and from the testimony, exhibits, arguments, and memoranda, the Board makes the following

FINDINGS OF FACT

I

The RV park development at issue is located in the town of La Conner on land leased from the Port of Skagit County. Only a small portion of the development is within the 200' foot shoreline limit of the Swinomish Slough. The site of the development does not extend to the water at any point and is surrounded by public roads or streets which provide public access to the shoreline and the Port's La Conner Marina.

II

In 1985 Dr. James A. Cobb, a retired physician, submitted to the Town of La Conner (hereinafter the "Town") an Application for Shoreline Permit No. 85-2 which described his proposed development as a "Recreational Vehicle Park--to be composed of 48 parking areas, provided with all support services, privacy landscaping and on-site recreational opportunities". Attached to the application was an environmental check list, paragraph 11 of which required: a "complete description of your proposal including the proposed uses ...".

Dr. Cobb's entry was: "To construct a sixty unit recreational vehicle park which will be provided with all support services, privacy landscaping and internal recreational opportunities."

Neither document contained any reference, stipulation, or commitments to public use of the park.

III

Witnesses for the Town testified that, at the Town hearing on the application, Dr. Cobb stated that the development would be open to members of the camping public who paid the entrance fee, that the resort facilities would include a large swimming pool, spa, weight room, showers, kitchen, laundry and general recreational facilities which would be open to the public except when heavily used by the RV users of the park. Dr. Cobb testified that he did not promise that such public usage would be a continuing policy.

IV

The Town Council minutes of March 26, 1985 carries this record of the Town's hearing:

> *SHORELINE PERMIT - SWINOMISH DEVELOPMENT RV PARK: The Planning Commission recommends approval. Councilmember Neva Malden asked about an RV dump station. None is planned. The Health Department has OKd this as designed. Councilmember Neva Malden asked about drainage in this area. Dr. Cobb stated that the park is on 5' of soilage from marina dredging and the drainage is excellent through the sandy spoilage. Upon motion by Councilmember June Overstreet, second by Councilmember Judy Iverson, this shoreline permit was approved.*

Questions and answers of Councilmembers and Dr. Cobb relevant to ecological factors are recorded in the above minutes. There is no

record of any questions, opinions, or commitments by either the Council or by Dr. Cobb concerning the public's use of the RV park.

V

The shoreline permit was issued, dated March 26, 1985, and signed by the then Mayor, Mary Lam. The permit carries the direction to "(be specific or refer to application)" when describing the project. The only entry is: "Recreational Vehicle Park".

The permit also provides for a statement of conditions: "subject to the following conditions (if applicable)". The entry on the permit is "none".

VI

The Town then issued a Certificate of Authorization to Issue Building Permits. Building permits are issued by Skagit County. The Certificate described the park as having 60 parking areas.

VII

After the park, now named Potlatch RV Park, was constructed, RV parking spaces were open for a fee to the public on a first-come, first-served basis. Residents of La Conner purchased punch cards for use of the swimming pool. A physical therapy program utilized the pool. Swimming classes were given for elementary school pupils, and high school athletes used the weight room.

VIII

In 1987, due to high overhead and disappointing revenues,

Dr. Cobb began the process of converting Potlatch to a members-only park by filing with the Real Estate Division of the State Department of Licensing the public offering statement required by RCW Ch. 19.105, the Camping Club Act. The filing indicated that he intended to sell 680 camper memberships (ten per parking area which by then had risen to 68) and 500 social memberships for use of the rest of the facilities. For the first eighteen months of membership sales, overnight rentals of campsites and casual rentals of the recreational facilities to the non-members continued in order to maintain a cash flow during the transition period. There was no evidence presented to this Board of any adverse comment or action by the Town at that time due to Dr. Cobb's membership plan or the expansion to 68 parking spaces.

IX

In 1988, Dr. Cobb applied to the Town for another shoreline substantial development permit to expand the park by adding 80 spaces in a contiguous vacant field north of the existing park. The Town denied the application on the grounds that the expansion was not "shoreline-related" as defined by the Town Shoreline Master Program. Dr. Cobb appealed the decision to this Board which upheld the denial in SHB No. 88-29 (1988). The 1985 permit was not under review at that time. However, in its Conclusions of Law the Board questioned whether the 1985 permit should have been approved because of the same

"shoreline-related" consideration. The Board also found that "The marina operation is separate from the R.V. Park and is not in any way dependent on the R.V. Park. The relationship between the two operations is merely one of physical proximity." The opinion also stated in its Findings of Fact X, that "The RV resort has recently converted to a membership format, associated with a national network." This put the Town on notice of Dr. Cobb's membership plan. However, no evidence has been presented to this Board of any adverse comment or action by the Town against Dr. Cobb at that time.

X

In early 1990, after having his attorney review relevant property documents including those sent by the Town at the attorney's request, Steve Olsen, president and chief executive officer of Advanced Resorts of America, Inc., (hereinafter "Advance") purchased the lease and Potlatch RV Park from Dr. Cobb.

XI

Advance continued the conversion to membership process with some changes. The social membership category was eliminated. The price of memberships was raised from $2,995 to $4,995. Swim permits at $495 per annum were substituted for the previous punchcard system. Advance also eliminated nonmember use of the RV parking spaces except as a promotional device whereby nonmembers can park free of charge if they attend a sales presentation of 30 to 60 minutes. The laundry remained

open to the public, and free use of the pool for children's swimming lessons continued.

XII

Ten trailers owned by Advance were placed in the Park for overnight accommodations for members who wish to vacation there without bringing their own trailers. Use of the trailers is free of additional charge and is limited to a maximum of two weeks a year with a week's extension as a reward for bringing in new members. The ten trailers have their wheels on, are registered with the State as recreational vehicles, and are stabilized in position by supports as are the other RV's in the Park. Mr. Olsen testified that Advance intends to move the trailers, as needed, between Potlatch and another RV park that Advance owns in Nehalem Bay, Oregon, and has done so once. Other testimony indicated that this move occurred shortly before the hearing in this matter.

XIII

By letter dated October 18, 1990, the Town's planner informed Advance that Potlatch RV Park was in violation of its shoreline substantial development permit and requested Advance to correct the violations within fifteeen days or cease operations within thirty days. The corrections required were (1) removal of eight of the 68 camper sites, (2) cessation of use of the ten Advance owned trailers until application for a new shoreline permit for their use was

granted, (3) restoration of public use of the swimming pool, and (4) cessation of membership-only use of the park and restoration of general public, non-member RV parking and camping use.

Advance appealed the notice of violations to the Town Council which upheld the planner's decision, and on January 23, 1991, the Town issued a notice to Advance rescinding the substantial development permit for Potlatch RV Park and ordering Advance to cease all operations. This appeal followed.

XIV

At the hearing, a Town Councilmember who had sat on the original permit decision in 1985 and on the notice of violation appeal in 1991 testified that, at the time of Dr. Cobb's initial application for the permit, the Town Council questioned whether the project was sufficiently shoreline-related as defined in the Town's Shoreline Management Master Program. The witness testified that the Council was persuaded that it could issue the permit because of Dr. Cobb's description of the park as being open to the public for use on a first come, first served per diem basis and because of his assurance that the swimming pool would be open to the public.

The former Mayor testified that she would not have approved the proposal if it had been described as a private facility, because the town's streets were being overrun at that time with transient recreational vehicles due to the lack of public RV facilities in the vicinity.

The Board finds no such description, questions, discussions, or opinions recorded in the Council minutes or in any document submitted to it as evidence.

XV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. From these Findings of Fact the Board enters the following

CONCLUSIONS OF LAW

I

The Board has jurisdiction over this matter. RCW 90.58.180. Since this is an appeal of a rescission rather than the granting or denial of a shorelines permit, the burden of proof is on the respondent. RCW 90.58.140 (7).

II

The Board reviews the rescission for consistency with the Town of La Conner's Shoreline Management Master Program and the Shoreline Management Act (Chapter 90.58 RCW).

III

The Pre-Hearing Order in this matter which was issued on March 19, 1991 listed nine issues for this Board to resolve. The substance of all nine can be stated in one issue: whether the four alleged violations cited in the Town's January 23, 1991 rescission letter to Advance warranted revocation (rescission) of the substantial

development permit issued to Dr. Cobb in 1985. Three other proposed issues are juridictional which must be decided by the courts involved, not by this Board. Each of the four alleged violations will be discussed individually after certain general criteria for the Board's Conclusions are established.

IV

Since the enactment of the Shorelines Management Act in 1971, the Board has maintained a consistent policy for the determination of what is necessary to establish the scope, extent, and conditions for a shorelines development permit. As early as 1974, in Yount et al. v. Snohomish County, SHB 108, the Board remanded a substantial development permit to the County declaring:

> *If local government issues a permit upon certain conditions, those conditions should appear on the permit itself or by reference stated therein and with the reference attached thereto....The Board makes the same criticism of the subject matter of the permit. We are urged to find that the purpose and scope of the permit is to be found in the environmental impact statement. We refuse to do so. The permit itself should describe with particularity and certainty what is being authorized. The description on the subject permit as a "marine industrial area" does not meet our test when no further explanatory material is attached to or expressly made a part of the permit.*

V

Hayes was affirmed in Hayes v. Yount, 87 Wn.2d 280 (1976) in which the Court paraphrased the above in making its decision:

The permit did not include, through incorporation by reference and attachment, a detailed site plan or a description of the particular uses. Although the environmental impact statement contains a further description, that document is not part of the permit. Under the Shoreline Management Act of 1971, the scope and extent of authorized uses is defined only by the contents of the development permit itself. Effective operation of the permit review process, as well as enforcement of the act demands that shoreline permits be complete in themselves and contain sufficient detail to enable the local government and the board to determine consistency with the policy of preferred water-dependent uses and other policies set forth in RCW 90.58.020 and the implementing regulations.

VI

In that same year, in Wolfsehr et. al. v Kittitas County, SHB 103 (1974), the Board found a permit defective:

Respondent's Exhibit 1 demonstrates that the county commissioners intended that the landfill permit be subjected to certain imprecise conditions. These conditions were not stated upon the permit, nor were (certain exhibits) attached thereto or referenced in any way. The permit is technically defective in that certain conditions sought to be imposed thereon by the county were not, as they should be, expressly made a part of the permit.

VII

In Brocard v. San Juan County, SHB 1981 (1975), the court confirmed a permit rescission where the construction was not completed in time. The "application became a part of the resulting permit", and the application had established a time limit for the end of construction.

VIII

In Goodman v. City of Spokane, SHB 214 (1976), the Board addressed the "scope" of the project:

> *"Scope" of a project must be defined as the specific substantial development... described (1) on the face of the permit itself, (2) in those documents specifically incorporated in the permit by reference or, (3) on the site plans which accompanied the original application.*

IX

In Tarabochia and Ancich v. Town of Gig Harbor, SHB 77-7 (1977), the Board defined the following limitation:

> *Furthermore a permit is limited to the construction and uses expressly sought and represented in the application for the permit. Well established procedural due process notice requirements compel that result. The public and any citizen who has examined the application and noted the limited use to which the property is to be put has a right to rely on the representation therein. If a permit simply authorizes a development in general descriptive terms, the scope of the permits is of necessity limited by the application.*

We conclude that, in view of the "due process notice" requirement stated above, we do not need to decide whether the Bona Fide Purchaser for Value doctrine, which would have established similar due process notice requirements, applies to this case.

X

The Board declines to modify or expand the above well established precedents. We conclude that due process requires that the uses and

conditions imposed upon a substantial development permit are limited to and will be determined solely from those specified on the permit and any documents specifically noted on or attached thereto, or on the application for the permit, or on the site plan(s) for the development.

XI

Since the permit issued to Dr. Cobb in 1985 specifically states "none" under applicable conditions, the Board concludes that no such conditions were or are imposed by the permit.

It remains then to determine whether any or all of the four alleged violations charged by the Town's rescission letter of January 23, 1991 are changes of use from those authorized by the permit which require a new substantial development permit or warrant the rescission of the 1985 permit.

XII

The first alleged violation is:

"The permit is for sixty (60) parking pads for recreational vehicles. The original shoreline permit requested forty-eight spaces, however the Certificate of Authorization did grant sixty (60) spaces. Potlatch has sixty-eight marked and utilized spaces. The eight additional are not permitted and must be removed."

Dr. Cobb's application for the permit specifies 48 parking spaces. Since the Town, for unknown reasons, authorized sixty and, in its letter, cited only eight spaces as being in violation, we need consider and rule on those eight additional spaces only.

The Board concludes that only sixty spaces were auth
Potlatch and that the eight additional spaces are in viol
1985 permit.

XIII

The second alleged violation is:

"Potlatch has ten (10) pads housing ten (10) permane
The permit is for a recreational vehicle park which by de
parcel of land upon which R.V. spaces for overnight use a
R.V's are portable temporary dwellings used for travel, r
vacation puposes. A recreational park is not a motel or
permanent lodging facilities. This is a change in use wh
continues, requires a new shoreline permit application tc
the appropriate process to be followed. In the meantime
cease."

XIV

The above allegation uses the term "by definition" w
stating the source of the definition(s). There are no su
definitions on the permit, the application, the site plan
Town's SMP itself. It appears that the above definitions
from a zoning ordinance. Section XI,B, 1.a. of the Town'
program defines the functional relationship between the S
land use controls: "The provisions of this Master Progra
addition to and do not replace other local land use contr

1.b. the functional relationship between the Town's zoning ordinance and the master plan is designated as "performance standards."

The term "performance standards" is not explained nor described and the meaning is ambiguous: how is the project to be built?; where is it to be built?; how operated?; or some other undefined meaning?

XV

Two zoning ordinances were admitted as exhibits. One is clearly identified as having been adopted on September 14, 1982. This ordinance has no definition of a recreation vehicle park, and its definition of a recreational vehicle is different from that of the second ordinance. The second one which appears to be the source of the definitions found in the allegation carries no date of adoption or effectivity on the portion submitted (hereinafter referred to as the "second" ordinance).

XVI

Shoreline permits run with the land (Goodman v. City of Spokane, supra). Therefore, the uses and conditions which were authorized at the time of the permit issuance will control. Since we do not know the adoption or effectivity date of the second ordinance, we conclude that the provisions of the 1982 zoning ordinance apply to the 1985 shoreline permit issued to Dr. Cobb.

XVII

The only relevant definition in the 1982 zoning ordinance is

found in section 17.08.460, RECREATION VEHICLE:

> *A vehicular unit primarily designated as a temporary living quarters for recreational, camping, or travel use; it either has its own motive power or is designed to be mounted on or drawn by an automotive vehicle. Recreation vehicle includes motor home, truck, camper, travel trailer, and camping trailer.*

The ten trailers in question meet that criteria. They are designed to be drawn by an automotive vehicle and are used as temporary living quarters. Since the three uses, recreation, camping, and travel, are stated in the alternative, any one of the three uses satisfies the definition. The trailers do satisfy "recreational" use, whether or not they are used for camping or travel.

As previously noted, the 1982 ordinance has no definition for a recreational vehicle park.

XVIII

Even if the definitions in the second ordinance governed, we do not find the ten trailers in violation of the second zoning ordinance.

XIX

In State ex rel. Weiks v. Tumwater, 66 Wn.2d 33 (1965) at pp. 35, 36, the court stated:

> *An ordinance must be clear, precise, definite and certain in its terms ... The basis for the rule ... is the necessity for notice to those affected by the operation and effect of the ordinance, and the necessity for such notice is especially strong, of course, where the ordinance is penal in character. (cite omitted). So also is the necessity for notice especially strong where the effect of the (zoning) ordinance is to regulate the otherwise free use of property.*

We examine the terms of the second ordinance to determine if they provided to Advance the due notice which is required to support the County's rescission of the 1985 shoreline permit.

XX

Respondent's Hearing Memorandum quotes the second zoning ordinance's definition of a "recreational vehicle" as "any portable, temporary dwelling used for travel, recreation and vacation purposes, and includes travel trailers, etc." However, the Memorandum defines a recreational vehicle, in Webster's terms, as a "recreational vehicle designed for recreational use (as in camping.)" We conclude that the ten trailers are "designed" for recreational use and meet that criterion. The Memorandum states that the ten trailers are permanently affixed (although they are on wheels and not permanently affixed), that they are not mobile (although they can and have been moved), and that it "is commonly understood that a recreational vehicle ... travels with its owner or lessee from place to place. This "common understanding" would imply that if a recreational vehicle is not on the move, is parked beside the owner's principle residence for a period of time, or is being used by a friend rather than the owner, it is no longer a recreational vehicle. We conclude that the definition is neither common nor acceptable.

It appears that the Town is interpreting its definition of recreational vehicle to its own end by redefining its words and by

relying on unsupported "common knowledge". Since the Town offers such further interpretation as an explanation of its intent, we conclude that the ordinance in itself does not provide the clear, precise, definite, and certain terms required to meet the "strong" requirement of acting as notice to Advance that the ten trailers would, in fact, be a prohibited change of use.

XXI

McNaughton v. Boeing, 68 Wn.2d 659(1966) at 662 states

> ... *zoning ordinances ... will be upheld if there is a substantial relation to the public health, safety, morals or general welfare.*

There is no evidence that the presence of the ten trailers on Potlatch have any relation to or effect on anyone's health, safety, or morals.

Public access to the water is a condition relative to general welfare and is a criterion to be considered at the time of issuance of a shoreline permit. We conclude that the ten trailers neither facilitate nor impede the public's access and use of the water any more than any other trailer which uses the park pursuant to the 1985 permit.

XXII

The second ordinance defines a Recreational Vehicle Park as: "Any tract or parcel of land upon which two (2) or more recreational vehicle spaces for overnight use are provided with or without utility services".

Potlatch, with or without the ten trailers in question, provides more than two recreational spaces for overnight use. And, if the Town intended that the word "overnight" should restrict the use to one night only, it should have so provided in the definition. (The Board is not required to and does not decide at this time whether such a provision would survive legal scrutiny.) We conclude that Potlatch conforms to the definition of a recreational vehicle park in the second zoning ordinance.

XXIII

The Board concludes that the ten trailers do not violate the provisions of the 1985 permit or documents specifically referenced thereon, the application, the site plan, or either of the two zoning ordinances submitted as exhibits whichever, if either, is applicable.

XXIV

The third alleged violation is:

"The original shoreline application as approved by the Planning Commission and as presented by Dr. Cobb, included the use of the pool for the public. The public provision promised in the approval process is not now available. This use must resume."

XXV

Nowhere on the application submitted by Dr. Cobb is there a reference to the use of the pool for the public or for any other purpose. Nor is there any such reference on the permit or any other document referenced or attached to the permit.

If "The public provision promised during the approval process" refers to the promises allegedly made orally by Dr. Cobb at the City Commission's hearing, such promises must be expressly stated on the permit, Brulotte v. Yakima County, SHB 137 (1974). Because such promises were not on the permit, the Board concludes that the requirement, that permit documents provide due notice to the public, is not fulfilled.

The Board further concludes that the use of the swimming pool by Town residents would be an unreasonable requirement that would not further the policy of the Shoreline Management Act nor aid the implementation of the local master plan, Green v. City of Bremerton, SHB 81-37 (1982). More particularly, we cannot find or conclude that free or inexpensive access to the Potlatch facilities for a particular small group of the public, in this case the Town's residents, is a use contemplated by the purposes of the Shoreline Management Act.

XXVI

The Board concludes that the alleged denial of the public's use of the Potlatch swimming pool does not violate the 1985 shoreline permit.

XXVII

The fourth alleged violation is:

"The original application contemplated that the R.V. park would be open to the general public. The switch to a "membership only" system violates the permit and the La Conner Shoreline Master Program. The park must revert to its former use and allow non-member R.V. parking and camping."

XXVIII

We note first that Dr. Cobb's application carries no statement nor "contemplation" that Potlatch would be open to the general public. The application description of what was to be built was: "Recreational Vehicle Park--to be composed of 48 parking areas, provided with all support services, privacy landscaping and on-site recreational facilities." The only description on the permit itself was "Recreational Vehicle Park". Neither of these general descriptions carries any other limiting or conditional terms.

XXIX

Potlatch has never been fully open to the general public. Turning to Webster's New World Dictionary, "general" is defined as "a whole class". (emphasis added). A facility is truly open to the general public if anyone can make use of it, such as a free municipal park. Potlatch trailer spaces are and have been open only to the limited group of the public who are able and willing to pay a prescribed fee. How much the fee is or when paid is irrelevant.

XXX

The Town contends that it approved the 1985 permit because use of the facility by the Town residents was assured by discussion and promises made between the Town Council and Dr. Cobb during the approval process. No such discussions or promises appear in the minutes for the Town meeting in which the approval was granted. This

omission does not meet the Town's own master plan requirement under Section VI SHORELINE PERMIT, B. Procedures, 4 Council Action, "The Town Council shall:

> *... c. Make findings relating to conformance or nonconformance with the provisions of the Master Program; d. Approve ... the application based on said findings, and; e. Cause said action to be documented utilizing a (Shoreline Permit) form.*

If these requirements had been met, the alleged Town usage conditions would have been stated on the permit. (The Board makes no finding or conclusion as to whether such conditions would have met the requirement that they further the policy of the SMA or the implementation of the Town's master program. Green, supra.)

Accordingly, and as stated before, we are limited to the uses and conditions stated on the permit, on documents referenced thereon or attached thereto, the application, and the site plan. No such requirements for Town use appear on any of these documents and will not be considered in making our determination.

XXXI

A Department of Ecology employee who reviews shoreline permits for the Department testified that in her DOE group the term "R.V. park" implies that it will be open to public usage as opposed to membership usage. The employee testified, however, that there is no DOE regulation which affirms that implication. There was rebuttal testimony from a former DOE supervisory employee who denied that there was any such understanding in the Department.

Since no DOE document supporting the first witness's testimony was presented, her belief or understanding does not constitute due notice to the public, and the Board concludes that her testimony cannot be considered in its determination of the validity of the fourth alleged violation.

XXXII

While we do not find the following dispositive in our decision, the Board notes that the Town was put on notice by the 1988 Board decision that Dr. Cobb had already begun a changeover to a membership system at that time and that there is no evidence of any objection to or action against Dr. Cobb because of his changeover. Had the issue been raised at that time, it would either have been resolved by the time of the purchase by Advance or, if not, it would have acted as notice to Advance that the issue existed.

XXXIII

The Town contends in its Hearing Memorandum (p. 7) that, at the time of the issuance of the 1985 permit, the project did not qualify as a shoreline-dependent or shoreline-related use as required by the Town's master plan. (Section VIII, 7., a.) (While strict conformance to this requirement of its own master plan should have, perhaps, dictated the Town's denial of the 1985 application, that issue is not before us at this time.) The Memorandum continues that, despite this deficiency, the Town ruled favorably on the application because the

project would meet public access, public camping, and public recreational needs in the port area.

XXXIV

In affirming the denial of Dr. Cobb's application for an expansion of Potlatch in 1988 (SHB No. 88-29, the Board made the following observations about the already established portion which was authorized under the 1985 permit (on page 7):

> *The primary attraction for customers of the resort is the historic and attractive LaConner downtown business district which can be reached by a few blocks walk. Shoreline access, per se, is incidental to the resort's location. But, there is nothing intrinsic in the resort's character drawing the public to the water, beyond its shoreline proximity. For example, it does not act as a magnet for shoreline use because it opens up water views or water uses not available without it.*
>
> *Under all the facts, we are not persuaded that the RV park extension would have a positive impact on access to shorelines by the general public which can be deemed substantial.*

Similarly, this Board is not persuaded that Potlatch, whether under a daily fee permit or membership system, has any substantial impact on access to the shorelines. Full access is already provided by the road which passes between Potlatch and the water.

XXXV

The Board concludes that the 1985 permit issued to Dr. Cobb authorized the use of the site for an RV park without further definition or conditions, that Potlatch is an RV park, and that the change from a daily permit fee system to a membership only system did not reduce or diminish the public's access to the water. We conclude that the change to a member only plan is not a change of use in violation of the 1985 substantial development permit.

XXXVI

In summary the Board has concluded that only the first of the four violations alleged by the Town constitutes an actual violation of the 1985 permit: that Potlatch has an excess of eight trailer spaces which were not authorized by the 1985 permit. We consider now the proper remedy for this violation.

In DOE v. Island County and Nichols Brothers Boat Builders, SHB 216 (1976), the Board concluded that additional structures not found on the original site plan required a new shorelines permit for the additional structures only, not a new permit for the entire development.

The Board concludes that the unauthorized eight spaces do not justify the rescission of the 1985 permit and, if the Town so chooses, it may require a new substantial development permit for those eight spaces only but not for the remaining sixty spaces and other features which were authorized by the 1985 permit.

XXXVII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such. From these Conclusions of Law the Board enters the following

ORDER

THAT the rescission of the substantial development permit for Potlatch which was issued to Dr. Cobb in 1985 is REVERSED and the 1985 permit remains valid for sixty trailer spaces and all other structures, facilities, etc. authorized by that permit; and,

THAT within one month of the date of this Order, the appellant will submit, as determined by the Town, either an application for a revision to the 1985 substantial development permit authorizing the eight presently unauthorized trailer spaces or an application for a new substantial development permit for the eight spaces only; or,

THAT, failing such application submittal, by three months from the date of the issuance of this Order, appellant will have reduced the number of Potlatch trailer spaces to sixty by completing the removal of eight trailer spaces.

DONE this 30th day of March, 1992.

SHORELINES HEARINGS BOARD

HAROLD S. ZIMMERMAN, Chairman

(See Dissenting Opinion)
JUDITH A. BENDOR, Member

ANNETTE S. McGEE, Member

NANCY BURNETT, Member

LES ELDRIDGE, Member *

(See Dissenting Opinion)
JUDITH A. BARBOUR, Member

JOHN H. BUCKWALTER
Administrative Law Judge

0027j * Les Eldridge concurs with the result of this opinion (reversal of rescission) but dissents from the conclusion expressed in XXXV (pg 25), concurring instead with the conclusion expressed in the minority opinion (XI, pg 19) that "requiring persons to first buy a $3995 membership..... restricts the access..... providing a diminished public access" and (pg 20) "it is possible that some mix of daily fee general public access and membership-only access could be lawfully permitted under the SMA and the Town's SMP."

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

ADVANCE RESORTS, INC. Appellant, v. TOWN OF LA CONNER, Respondent.	SHB No. 90-91 FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND DISSENT

Our colleagues' Findings of Fact and Conclusions of Law are only agreed to by three Board Members, and therefore will not constitute precedent in other cases. Our opinion will comment on this other opinion. We do respectfully dissent from the Shoreline Hearings Board Order which is joined by four of our colleagues, which reverses the Town of La Conner's revocation of a shoreline substantial development permit.

Hearing transcripts were prepared of the hearing testimony of Cobb, Hegy and Lam on October 31, 1991. These have been filed with the record and have been cited in this opinion where appropriate.

Having reviewed the entire record, we now issue these:

FINDINGS OF FACT

I

In 1974 Skagit County issued a shoreline substantial development permit to the Port of Skagit County for marina expansion adjacent to

the Town of La Conner. The permit was appealed to the Shorelines Hearings Board. The Board affirmed the permit as to the marina, but not as to the industrial expansion. Citizens in La Conner v. Skagit County and Port of Skagit County, SHB No. 166 (1975). In that decision, the Board stated:

> *The proposed expansion is a well-planned development which greatly enhances the public's right in navigation and facilitates public access to the shorelines of the state not only through its boat moorages, but also through its camping facility and two public fishing floats.* SHB No. 166 at Conclusion of Law IV.

The camping facility was to be for the use of the general public, at a location north of the proposed marina. The Port subsequently leased property in a different location but adjacent to the marina to a recreational vehicle (RV) park known as Potlatch Resort.

II

On January 28, 1985 Dr. James Cobb, dba Swinomish Slough Development Company, (hereafter "Cobb"), filed a shoreline substantial development permit application with the Town of La Conner for an RV park on land to be leased from the Port. The property is in the Town of La Conner. It is within 200 feet of the Swinomish Channel and is therefore a shoreline of the state under the Shoreline Management Act, Chapt. 90.58 RCW. It is within a shoreline area which is designated as Urban in the Town's Shoreline Management Master Program (LCSMMP).

The Town granted the permit which was not appealed to this Board, and the shoreline permit became final. this RV park is known as Potlatch RV Resorts.

III

In 1987 or early 1988 Dr Cobb applied for a different shoreline permit, to add 80 RV spaces to the north of the existing resort. The Town denied this permit application in 1988, and the denial was appealed to the Shoreline Hearings Board. After a full hearing on the merits, the Board upheld the denial. James Cobb, dba Potlatch RV Resort v. Town of La Conner, SHB No. 88-29 (November 15, 1988); Exh. R-11. The Board explicitly stated about the 1985 shoreline permit that it:

> *was not reviewed by this Board and it validity is not now before us*. Conclusion of Law IV, page 7.

The Board's affirmation of the denial was not appealed.

IV

In 1990 the Town planner informed the current holder of the 1985 permit, Advance Resorts of America, Inc., that the Potlatch RV park was in violation of the 1985 shoreline substantial development permit. (Letter dated October 18, 1990.) The letter stated that unless Advance Resorts corrected the violations within fifteeen days, the shoreline permit will be revoked and business operations will be required to

stop. The alleged violations and corrective actions listed were:

1. Having and using 68 RV parking pads. The Town stated only 60 spaces were authorized. Eight spaces had to be removed.

2. Having 10 permanent trailers on site. The Town stated that the shorelines permit was:

> *for a recreational vehicle park, which, by definition, is a parcel of land upon which R.V. spaces for overnight use are provided. R.V.'s are portable, temporary dwellings used for travel, recreation and vactation purposes. A recreational park is not a motel or hotel with permanent lodging facilities. This is a change in use, which, if it continues, requires a new shoreline permit application to be filed and the appropriate process to be followed. In the meantime, the use must cease.* Exh. R-8.

3. The public's use of the swimming pool had to be restored.

4. The RV park's "membership only" system violated the shoreline permit and the La Conner Shoreline Management Master Program. The Town required restoration of non-members RV usage.

V

Advance Resorts appealed the notice of violations to the Town Council. The Council upheld the planner's decision, issuing a letter on January 23, 1991 revoking the 1985 shoreline substantial development permit for Potlatch RV Park and ordering the cessation of operations.

Advance Resorts timely appealed this revocation (hereafter "rescission") to the Shorelines Hearings Board. The appeal became SHB

No. 90-91. On February 25, 1991, the appeal was certified for review.

VI

Facts pertinent to determining what is the 1985 permit are now presented.

In 1985 the Town of La Conner Planning Commission and subsequently the Town Council held public meetings on the proposed shoreline permit. At the Shoreline Board Hearings, Dr. Cobb provided sworn testimony, recalling his presentation to the Town on the shoreline substantial development permit:

> *The project was presented initially at that time that the public would have access to the project and that we would be most happy to sell pads per night to people that even had memberships at Thousand Trails.*
>
> [Thousand Trails is a membership-only RV park four miles from La Conner.]
>
> [...]
> *It was represented that the laundry facilities and the swimming pool would be available to the public depending upon our schedule and the use of the park.*
>
> *Q: Was there discussion about private memberships as part of the facility?*
>
> *A: No.*
> *[...]*
> *A: it was planned that the public would be admitted to the pool depending upon our liability and the use of the pool as far as our primary patrons were concerned.*
> *[...]*
> *Q: And after you opened the facility what was the basis upon whch people were admitted to the park?*
>
> *A: Well, they would drive in and ask to stay overnight and we would rent them a space.* Transcript of Cobb, October 31, 1991, at 6-7.

The development would be open to any member of the public who drove up to the resort entrance with a trailer, camper, motor home, or tent, and rented a pad. Cobb at 20-22. Dr. Cobb also told the Port the RV resort would be open to the general public. Cobb at 32-33.

VII

At the hearing before this Board, former Mayor Mary Lam gave sworn testimony. She had been the Mayor from 1980-1987. As the Mayor she attended Town Council meetings on the Cobb shoreline permit application. She testified that:

> *Dr Cobb described the RV park as a recreational vehicle park which would be open to transient boaters as well as to the general public of the town of La Conner and membership would not be required of people using the facilities. The Council questioned him and there was a great deal of public input about that issue because there is a requirement in the Shorelines law public access the Port of Skagit County as publicly ownned property, tax dollars, public tax dollars, therefore public acceess [sic.] is necessary for a permit in that area in any Shoreling [sic.] area.* Transcript of Lam at 5.

Lam also testified that Cobb referred to RV owners who owned small boats and might trailer them into La Conner and use the launch facilities. Cobb said they would be allowed to keep their RVs at the park and use all the facilities. Lam at 6. Cobb said that transient boaters who used the Port marina's guest dock would also be allowed to use the park. Lam at 6. Cobb also represented that there would be times for people who live in La Conner to use the swimming pool, and other facilities within the building. Lam at 6.

According to Lam, the Town had received complaints about RV parking in the downtown core. Only a small area was available for RVs to camp, in Pioneer Park, and it did not have hook-ups for water, sewage or electricity. RVs were camping in parking lots, alongside the narrow streets, and in residential neighborhoods. Lam at 9-10. The Cobb RV park was viewed as a "God sent", a place for the RVs to park and people to enjoy the Town. If Dr. Cobb had not clearly indicated to the Council that the park was open to the public, Lam testified, she would:

> *have worked very hard and spoken out against it at the [Town Council] meeting because I don't believe that that is what the town's people would have wanted to happen on that piece of property and for the town of La Conner.* Lam at 11.

According to Lam, there were no specific conditions written on the permit. Dr. Cobb had given his word and assurances about the resort. Lam at 13 and 18. The Town did not write conditions. It is a small town. It was accustomed to accepting people's word as good faith. Lam at 18. From the way Cobb described the project, she testified, the Town did not feel the need to condition everything he had described. Lam at 23. As described, the proposal was within the Shoreline Act parameters for public access, and that was the only way it came within the parameters, she testified. Lam at 24. The Town only wrote conditions on shoreline permits for conditional use or variance permits, if they wanted something special to be done. Lam, at 23.

She also stated that Town meetings were tape recorded. It was usual for the minutes not to be verbatim, and to not contain a full discussion of what the Council might discuss. Lam at 12 and 22.

VIII

Town Councilmember Don Wright also gave sworn testimony. He had sat on the original permit decision in 1985 and on the notice of violation appeal in 1991. He stated that at the time of Dr. Cobb's initial applied for the permit, the Town Council questioned whether the project was water-related as defined in the Town's Shoreline Management Master Program. The Council was persuaded it could issue the permit because the park would be open to transient boaters using the Port marina or the Town's boat launch.

IX

The RV park is separated from the Channel and the Port marina by a road. The Port marina both rents moorage, and has transient boat moorage. The Port also has a lift, and boats can be launched for a fee.

There are two boat ramps in the Town of La Conner and numerous fishing piers in the downtown. The RV park is within walking distance of the downtown.

X

The shoreline permit application describes the proposal as:

> *Recreational Vehicle Park--to be composed of 48 parking areas, provided with all support services, privacy landscaping and on-site recreational opportunities.* Exh. R-1.

The attached environmental checklist described the proposal as:

a sixty unit recreational vehicle park [...] with all support services, privacy landscaping and internal recreational opportunities." Exh. R-2; paragraph 11.

XI

The Town issued a shoreline substantial development permit for the RV park. Subsequently the Town issued a Certificate of Authorization to Issue Building Permits. Building permits are issued by Skagit County. The Certificate described the park as having 60 parking areas.

XII

The Potlatch Resort overnight camping was available to the public on a first-come, first-served daily basis, for the payment of the nightly fee. (There were, however, two trailers that paid monthly.) Cobb at 40-41. The nightly fee was $12 to $14. Cobb at 43.

Town residents used the swimming pool by purchasing a $40 punch cards for 20 swims. Families swam together. A physical therapy program utilized the pool. Swimming classes were given for elementary school pupils, and high school athletes used the weight room.

XIII

Cobb began to have financial problems operating the resort. In 1988 he began to also sell memberships for the use of the resort, joining an organization known as Coast to Coast. Membershps sold for $2,995 (plus tax). Exh. A-3.Cobb at 45. Overnight camping for the general public continued, for the fee of $12-$14.

By no later than October 1988 the Town was aware that Cobb was selling memberships. James Cobb, supra.

XIV

With the selling of memberships, Cobb was required to file a registration/public offering statement with the Real Estate Division of the Washington Department of Licensing for these camping membership sales. Washington Camping Club Act (Chapt. 19.105 RCW). The filing stated Cobb planned to sell 680 "camper memberships". These members had the right to use RV overnight campsites and hookups, as well as all resort facilites and the right to participate in reciprocal camping programs that may be offered from time to time by the Operator. (By this time, the number of sites had been increased to 68. So 10 camper memberships were going to be sold per site.)

The filing also stated there would be 500 "social memberships", with the right to use the park's recreation facilities, but not the overnight camping sites or hook-ups, nor the reciprocal camping programs.

Cobb continued to take overnight reservations from non-members.

XV

In the fall of 1989 Mr. Stephen Olsen, President and CEO of Advance Resorts of America, Inc., learned that Potlatch Resorts was for sale. In November he spoke with Cobb about the resort. Olsen was aware that Cobb was changing the resort to a membership base, and that

per night usage was still open to the public.

Cobb provided Olsen with the permits, told him the expansion of the park had been denied, showed him the Washington registration filings, and informed him about what he, Cobb, had said to the Town about public access. Cobb told Olsen the resort was going to be open to the public. Cobb at 36. He also told Olsen that if he had any questions about the scope of the permit he could check with the Town Planner, with the Mayor, or with anyone in Town government. Cobb at 37. Prior to purchasing the resort, Olsen's Oregon attorney looked at property documents, including those sent by the Town at the attorney's request. Subsequently, Advance Resorts purchased Potlatch Resorts from Dr. Cobb.

XVI

Advance Resorts filed a registration statement with the Washington Department of Licensing Real Estate Divison. In the filing and in practice, Advance Resorts limited overnight camping to members only, or guests accompanying members. Advance entirely eliminated daily overnight usage by non-members, except as a promotional device for persons who agreed to attend a sales presentation. Memberships cost $4,995, and 500 memberships were to be sold.

Advance Resorts eliminated the social membership category. The $40 swim punch cards were eliminated. Instead, swim permits were sold for $495 per year. At the time of the hearing, there were 20 such

memberships. While there is no current ceiling on the number of memberships, Olsen stated that if necessary he would have limits. Advance Resorts allows use of the pool for children's swimming lessons with an independent contractor, but families are not allowed to swim together unless an RV membership or the $495 swim permit is purchased. This cost made the facility economically unavailable to some residents. The laundry facility remains open to the public.

XVII

Advance Resorts brought 10 trailers on site, for members' use for up to two weeks per year without additional payment, and beyond that $15 per night thereafter. The trailers provide lodging for members who do not want to bring their own RVs, trailers or tents. These on-site trailers occupied 10 of the existing 68 pads. At the time of the hearing they had their wheels on, and were registered with the State Washington as recreational vehicles. They were not, however, licensed to be on the road.

XVIII

The evidence on the proposed use of the park for overnight camping is uncontested. At no time in the permit application process, either in writing or orally, did Dr. Cobb state the RV park would be private, or be available only on a membership basis. To the contrary, he clearly and unequivocally stated at public meetings, and to the local officials who were responsible for reviewing and acting on the

permit, that the park would be available to the public overnight on a daily fee basis, including to transient boaters using the marina or the Town's boat ramps.

XIX

It is also uncontested that at no time did the permit applicant or the permit documents state the resort would place trailers on-site for use by travelers who came to them. To the contrary, the only thing Cobb was going to do was "rent pads." Cobb at 21.

At the Board hearing Mr. Olsen asserted the trailers were not permanent. Rather, he testified Advance Resorts intended to move the trailers, as needed, between Potlatch and another RV park that Advance owns in Nehalem Bay, Oregon, and had done so once. The only time the trailers had been moved off-site, however, was just before the Shoreline Hearings Board hearing in October 1991. A temporary permit was obtained to move them on public roads.

We find the assertion the trailers were temporary is not supported by the evidence.

XX

We find by a preponderance of the evidence that the shoreline permit proposed general public access to the swimming pool only so long as the resort operator concluded it was advisable depending on the schedule, the use of the park as far as campers, and liability.

XXI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, we enter the following:

CONCLUSIONS OF LAW

I

The Shorelines Hearings Board has jurisdiction over this appeal of the rescission of a shoreline permit. RCW 90.48.180(1).

II

The Shoreline Management Act is clear that the burden of proof is on the party appealing the granting or denying of a shoreline permit. RCW 90.48.140(7). The statute is silent, however, on the burden when a party is appealing a rescission.

We conclude, by analogy to the concept of *expressio unius*, that in such instance the burden is on the rescinding authority. Such an approach is in harmony with viewing this as the appeal of an enforcement action, where the burden is on the governmental agency.

III

It is within the local government permit issuing authority's discretion, if violations of the shoreline permit are found, whether to enforce the permit by recission, by enforcement under RCW 90.58.210, or by revision. In this instance the Town of La Conner chose recission. The rescission is appealable to the Shoreline

Hearings Board.

IV

In the appeal of a permit rescission, in contrast with the appeal of the granting or denying a shoreline permit, the Board is without authority to otherwise condition or modify the Town's action. The Board's decision and order can only affirm or deny the rescission.

V

The Board reviews the rescission to determine if the current operations are consistent with the previously issued 1985 shoreline permit. In so doing, the validity of that permit is not at issue. The current holder of the shoreline permit, which runs with the land, is entitled to the finality of the previously issued 1985 shoreline substantial development permit.

In this case, the Board has to determine what constituted the previous permit approved by the Town of La Conner. This is a somewhat different inquiry then determining, in the review of a permit revision, what is the "scope and intent". In this case, the shoreline permittee has not applied for a revised permit. Therefore citation to case law on permit revisions should be done with some caution.

VI

In reviewing this permit rescission, the Shoreline Hearings Board looks at the hearing record in SHB 90-91 as a whole, including testimony and documents submitted, to determine what was the original

permit. See, Wolfsehr et al. v. Kittatas County, SHB 103 (1974). In doing so, a liberal interpretation rather than a strained result, is to be fostered, to promote the goals and purposes of the Shoreline Management Act. See, Hayes v. Yount, 87 Wn.2d 280, 289 (1976). The land to which this shoreline substantial development permit pertains is publicly-owned.

VII

We concur with the other opinion regarding the number of parking pads. The City ultimately authorized 60 parking pads. The City's action regarding the 68 existing pads, requiring the deletion of 8, is properly affirmed.

The parties can agree to extend the time for compliance. There is no authority cited, however, for this Board's Order extending time.

VIII

We agree with the other opinion that the Town's action regarding the swimming pool is not correct. But we do so for different reasons. Shoreline permit applicant Cobb made clear to the Town that the availability of the pool was contingent on overnight park users' needs and other factors. Findings of Fact VI and VII, above. Such factors came to pass. Therefore, Advance Resorts' changes did not contravene the 1985 permit.

We decline to join the other opinion's reasoning which cites

Brulotte v. Yakima County, SHB 137 (1974). See Conclusion of Law XII, below.

IX

We conclude that the moving of 10 trailers on-site and their use overnite is not within the 1985 shoreline permit.

The trailers are a "development" under the Shoreline Management Act, RCW 90.48.0030(3)(d), and a "substantial development" under RCW 90.48.030(3)(e). The trailers are used like a motel or hotel.

Nothing in the permit documents, oral statements, or the Town's actions, in any way even remotely suggests such trailers would be put on-site. The addition of these 10 trailers constitutes a new substantial development not within the 1985 shoreline permit. The Town's action should be affirmed.

In so concluding, we rely on the Shoreline Management Act itself. There is no need to rely on Town ordinances. Therefore it is irrelevant whether the trailers are permanent or temporary. (We did, however, find the trailers not to be temporary. Finding of Fact XVIII, above.).

X

We now address the most critical issue in the case: whether a membership-only RV park is consistent with the 1985 shoreline substantial development permit. We conclude the change is not within

the 1985 permit and the recission should be upheld.[1]

The evidence regarding the 1985 permit is clear and uncontroverted. None of the shoreline permit application documents state or even suggest the park, which is on public property, would be restricted to members-only. Given those documents, alone, as a matter of public notice, the public was entitled to assume the park was to be open to the general public. See, Tarabochia and Ancich v. Town of Gig Harbor, SHB 77-7 (1977). To conclude otherwise, and by implication to now narrow that 1985 permit to members-only, would be to mute one of the "hallmarks" of the SMA which provides opportunity for public comment at the local governmental level. See, Goodman v. City of Spokane, SHB 214 (1976). Such a constricted interpretation of the permit would be at variance with the goals and objections of the Shoreline Management Act (SMA) and the La Conner Shoreline Management Master Program (LCSMMP), and is to be avoided. See, Hayes v. Yount, supra.

---

[1] In so concluding, we note the Town's original 1985 permit decision with its conclusion that the RV park was "water-related". See James Cobb, dba Potlatch RV Resort v. Town of La Conner, SHB No. 88-29 (November 15, 1988). Were that issue now be before this Board, there is some question as to whether the permit would have been affirmed. Clearly neither the Town nor appellant Advance Resorts is advancing such argument, nor is that issue before us.

But the evidence is even stronger. Not only did the documents evidence no restriction to members-only, but at the public meetings the permit applicant himself, Dr. Cobb, affirmatively stated the RV park use would be open to the public for overnight use for a daily fee. His affirmative representations about the park's overnight availability were confirmed by the former Mayor's and a City Councilman's sworn testimony. See, Henderson v. Snohomish County and Barber, SHB No. 230.

XI

Three of us conclude that the Potlatch RV park's availability to the public for overnight camping on a daily fee basis was and is an essential, integral part of the 1985 shoreline substantial development permit application proposed and then approved by the Town of La Conner. (See Separate Opinion of Board Member Eldridge.) Under the 1985 permit any member of the general traveling public with an RV, trailer, or tent, could rent a pad on a first-come, first-served basis for a small daily fee $12-14. The park, on publicly-owned land, was open to the general public, including transient boaters, and facilitated some degree of public access to the shoreline.

Requiring persons to first buy a $3995 membership, as a matter of law restricts the access to a smaller number of people, providing a diminished public access. Such entry cost is an increase of 285 times over the previous daily cost. This cost inherently and

significantly limits those who can and will use the facility. Common sense and elementary principles of economics and human behavior make this apparent.

In addition, in this instance Advance Resorts also has limited the number of memberships. This limitation on the number of members is one of the key selling points to potential new members. By marketing design, Advance Resort has after permit issuance, intentionally limited the universe of people who could have access. All of this is occurring on public land. None of the permit documents or presentations at public Town meetings on the shoreline permit listed any numerical limitation.

The facility as presently operated is inconsistent with the 1985 shoreline permit, providing restricted access to a smaller universe of people.[2]

The magnitude of change for the conversion to membership-only can also be discerned by the requirements of Chapt. 19.105 RCW, which govern the sale of camping memberships in Washington State. These complex regulations do not apply if use of the park were on a daily fee basis. The change to a membership-basis is a change of form,

---

[2] This conclusion is consistent with Department of Ecology expert testimony presented through Senior Shoreline Specialist Hegy. This witness not only has current experience with the Shoreline Act and permits issuance, but also consulted other DOE personnel. A former DOE Shoreline Supervisor, the father-in-law of Advance Resorts' president did testify for appellant. He had retired from DOE in 1983. The testimony of the current DOE witness is more convincing.

substance and use.

It is possible that some mix of daily-fee general public access and membership-only access could be lawfully permitted under the Shoreline Management Act and the Town's Shoreline Management Master Program, paricularly if there were provision for non-member boaters. This, however, is not an issue properly before this Board in this rescission proceeding. See Conclusion of Law IV, above.

XII

Because the permit both as applied for and as granted was for a general public access facilty, (see Conclusions of Law X and XI above), there is no legal requirement in the Shoreline Management Act or case law for a permit condition on access. To the contrary, in the context of the Act's goals and policies for public access, if limitation to membership-only were to obtain, there would have to have been a specific description of this limited use on the permit itself.

Unfortunately, three of our colleagues simply turn the evidence and the law on its head, implying restricted access when there is none.

The cases cited in the other opinion do not support our three colleagues' position. In particular, Yount et al. v. Snohomish County, SHB 108, (affirmed in Hayes v. Yount, 87 Wn.2d 280 (1976)), the Shorelines Hearings Board remanded a permit, in part, back to local government because the permit was too vague for the Board to carry out

its statutory obligation. The permit application stated: "continue to expand transhipping cababilities and heavy industrial use." The public notice stated "marine industrial area". In contrast, in this case there is no assertion of invalidity of an original permit due to vagueness. Nor can there be, for the validity of the underlying 1985 shoreline permit is not at issue in this rescission action. See Conclusion of Law V, above. Such challenge would only be to appellant's detriment. Moreover, the facts are not even remotely comparable.

Tarabochia and Ancich v. Town of Gig Harbor, SHB No. 77-7, is relevant for the conclusion that permit application documents have to provide the public with notice, in this instance notice if the park would have limited access to members-only. See Conclusions of Law VIII above, and XV below at footnote 3.

In Wolfsehr et. al. v. Kittitas County, SHB No. 103, the Board affirmed a shoreline permit. Because the County had required there be subsequent governmental approval for the type of fill and its placement, the Shoreline Hearings Board held the permit had a "technical defect", and remanded it to include the subsequent approval as a condition. In Wolfsehr, the Board found the failure to include a condition to be a mere technical matter, not undermining the validity of the permit which it affirmed. As we concluded earlier, Wolfsehr holds that in determining what is the permit, one looks at the entire

record. See Conclusion of Law VI, above.

In Brocard v. San Juan County, SHB 181 (1975), the Shoreline Hewarings Board affirmed the rescission of a permit because the permittee in the application documents chose a time period and then failed to comply. The Board held this time period became a part of the permit. This decision is consistent with our holding in Advance Resorts.

Goodman v. City of Spokane, SHB No. 214 (1976) involves the Board's review of a permit revision. In that case, the Board concluded the revision was not within the "scope" of the original permit because there was a proposed parking lot that had not been shown on earlier permit documents. While this is a revision case, the result is consistant with our decision on the 10 trailers, see Conclusion of Law IX, above.

In Brulotte v. Yakima County and Clifford Morris, SHB 137 (1974), the Board remanded to the County a shoreline permit issued to Morris, for compliance with the State Environmental Policy Act and reissuance of the permit. During such process, County was to explicitly state as a condition the specific dust control measures permittee had agreed to in writing. In Brulotte, clearly the absence of such condition was not the basis for permit remand, and is akin to the technical defect in Wolfsehr, supra.

XIII

The other opinion contains some particularly problematic Findings of Fact and Conclusions of Law. Since Member Eldridge only concurred in the other opinion's result, the other opinion's findings and conclusions do not constitute precedent for other cases. Nonetheless, because they were used to support three of our colleagues' decision, we now address the Findings and Conclusions.

At the other opinion's Finding of Fact III, for example, it is stated:

> *Dr. Cobb testified [to the Board] that he did not promise that such public usage would be a continuing policy.*

It is unclear why such a non-statement is recited. There is no evidence that during the proceedings before the Town Cobb affirmatively, either in response to a question or during a discussion, stated he would not promise that such public usage would continue. The above quoted "statement" is about silence. Under such circumstance, silence is not evidence, and is not probative. Rather, it is the permit documents, Cobb's statements and representations, attested to by several witnesses, plus the discussions before the Town and its actions, which combine to govern the scope of the permit.

In the other opinion at its Finding of Fact IV, the disturbing pattern continues. Three of our colleagues recite part of the minutes of the Town council meeting, and then state:

> *There is no record of any questions, opinions, or commitments by either the council or by Dr. Cobb concerning the public's use of the RV park.*

The troubling substance and pattern these recitals about the Town's meetings and deliberations continue. At its Finding of Fact XIV, the other opinion recites some of the Town officials' testimony about public availability, and then states:

> *The Board finds no such description, questions, discussions, or opinions recorded in the Council minutes or in any document submitted to it as evidence.*

At its Conclusion of Law XXX the other opinion then relies on their Findings by stating:

> *The Town contends that it approved the 1985 permit because use of the facility by the Town residents was assured by discussion and promises made between the Town Council and Dr. Cobb during the approval process. No such discussions or promises appear in the minutes for the Town meeting in which the approval was granted*. [...](Emphasis added.)

There was, however, abundant sworn testimony at the Shoreline Board hearing on what was said at the Town meetings about the park's public availability. It is uncontroverted.

Our three colleagues then determine the Town had not followed its Shoreline Plan requirements for written findings. They then disregard the uncontroverted sworn testimonial evidence, basing their conclusions on written documents only. Conclusion of Law XXX.

Moreover, in yet another disregard of testimony, in this instance the expert testimony of DOE through its Senior Shoreland Specialist,

three of our colleagues state at Conclusion of Law XXXI:

> Since no DOE document supporting the first witness's testimony was presented, her belief or understanding does not constitute due notice to the public, and the Board concludes that her testimony cannot be considered in its determination of the validity of the fourth alleged violation. [membership issue].

The witness, presenting expert testimony for the Department of Ecology. There has been no assertion that the Department's views were presented to the Town in its consideration of the permit. However the above statement in the other opinion sweeps much too wide, disregarding the expert testimony in its entirety. See our Conclusion of Law XI above and footnote 2.

One is, in sum, left with the firm and definite conviction that the decision reversing the Town is in error. There appears to have been a disregard of settled principles on weighing evidence and reaching legal conclusions in the Findings, Conclusions joined by three members. A key feature of the de novo hearing before the Shorelines Hearings Board is to have witnesses sworn and testify. They are then subject to the rigors of cross-exmination. The Board's review in a contested case is not limited to a review of documents. In this manner, the Board proceeding provides procedural due process for the parties. The other decision's handling of evidence does significant injury to such due process.

XIV

The other opinion's Conclusion of Law XXIX is equally unfounded.

As has been done in several other instances in that opinion, the dictionary was relied upon, with three colleagues concluding that the word "general" means a "whole class". From that, they appear to also conclude, through the use of example, that for a park to be open to the "general public", it has to be free. Since Dr. Cobb charged a prescribed fee [$12-$14], three colleagues conclude the RV park is not open to the "general public":

> *Potlatch trailer spaces are and have been open only to the limited group of the public who are able and willing to pay a prescribed fee. How much the fee is or when paid is irrelevant.*

By such reasoning, if a state park were to charge a daily fee for the use of a camping site, or a city were to charge a daily fee for using its swimming pool, then these facilities would not be open to the "general public" any more than is a country club pool with a $5,000 membership fee. There is no legal citation for Conclusion XXIX. It contravenes basic purposes and goals of the Shoreline Management Act and the La Conner Shoreline Management Master Program. Fortunately it is not precedent. We also trust it will not long remain extant in this case.

XV

Since we have, to this juncture, affirmed the Town's rescission of the permit, appellant's remaining legal issue is now addressed.

Appellant contends that even if Dr. Cobb and the Town of La Conner had agreed on the use restrictions, the Doctrine of Bona Fide

Purchaser for Value prevents the Town from rescinding the shoreline permit now held by Advance Resorts. This contention is not supported in law. (See respondent Town's Second Supplemental Hearing Memorandum, filed December 31, 1991, for a cogent analysis.)[3]

The Bona Fide Purchaser for Value Doctrine does not apply to shoreline permits, which are a form of land use permit. Rather the Doctrine applies to encumbrances, ownership rights or restrictions which affect title. See Peters, Washington Real Property Desk Book, at Section 35.3, p. 35.3 (1989); Chapt. 65.08 Washington Recording Act. There is no legal requirement that local government record land use restrictions or permitted uses relative to the issuance of shoreline permits or other land use permits. Title insurance policies, for example, typically exclude such actions from coverage:

> *limitation by law or government regulations respective to the occupancy, use or enjoyment of the land* [...].

Peters, supra, at Section 35.16, p. 3515.

If Advance Resorts has been financially injured in a manner cognizable by law, such dispute is not within the Shoreline Management Act, but belongs in a different judicial arena, not before this Shoreline Hearings Board.

---

[3] Three of our colleagues suggest in *dicta*, at their Conclusion of Law IX, that the Doctrine establishes due process notice requirements. Such dicta will not be addressed in this opinion.

XVI

Any Finding of Fact deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, we now issue this:

DISSENT

Based upon these Findings of Fact and Conclusions of Law, the Town of La Conner's recission should be AFFIRMED.

DONE this 30th day of March, 1992.

SHORELINES HEARINGS BOARD

Judith A. Bendor
JUDITH A. BENDOR, Attorney Member

Judith A. Barbour 1 by TB
JUDITH A. BARBOUR, Board Member
WSBA # 10601